

Supreme Court of the United States

OCTOBER TERM, 1933

No. 606

UNITED STATES, PETITIONER

vs.

ROY LEE BARRETT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

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[fol. A]

[Clerk's Certificate to foregoing
transcript omitted in printing.]

[fol. 1]

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
AMERICUS DIVISION**

Criminal No. 1411

**ROY LEE BARRETT, JACKIE HAMILTON GAINES, and
CLEVELAND JOHNS, APPELLANTS**

vs.

UNITED STATES OF AMERICA, APPELLEE

CAPTION

APPEARANCES:

Elliott & Davis, Attorneys at law, Suite 506 Persons Building, Macon, Georgia, Attorneys for Appellants.

Mr. Floyd M. Buford, U.S. Attorney, Mr. William A. Davis, Jr., Assistant U.S. Attorney, Post Office Building, Macon, Georgia, Attorneys for Appellee.

APPEAL from the District Court of the United States for the Middle District of Georgia, Americus Division, to the United States Court of Appeals for the Fifth Circuit, returnable at the City of New Orleans, Louisiana.

[fol. 2]

INDICTMENT

THE GRAND JURY CHARGES:

COUNT ONE

On or about the 25th day of March, 1960 in the Americus Division of the Middle District of Georgia and within the jurisdiction of this Court, **ROY LEE BARRETT,**

JACKIE HAMILTON GAINEY and CLEVELAND JOHNS, did have in their possession and custody and under their control a still and distilling apparatus for the production of spiritous liquors set up without having the same registered as required by law, in violation of 26 U.S.C.A., Sections 5179(a), 5601(a).

COUNT TWO

And the Grand Jury further charges that at the time and place and within the jurisdiction aforesaid, the said **ROY LEE BARRETT, JACKIE HAMILTON GAINEY and CLEVELAND JOHNS** carried on the business of a distiller(s) of spiritous liquors without having given bond as required by law, in violation of 26 U.S.C.A., Sections 5173, 5601 (a).

COUNT THREE

And the Grand Jury further charges that at the time and place and within the jurisdiction aforesaid, the said **ROY LEE BARRETT, JACKIE HAMILTON GAINEY and CLEVELAND JOHNS** engaged in and carried on the business of a distiller(s) of spiritous liquors with intent to defraud the United States of the tax imposed thereon in violation of 26 U.S.C.A. Section 5602.

[fol. 3]

COUNT FOUR

And the Grand Jury further charges at the time and place and within the jurisdiction aforesaid the said **ROY LEE BARRETT, JACKIE HAMILTON GAINEY, and CLEVELAND JOHNS** worked in a distillery for the production of spiritous liquors upon which no sign was placed and kept, showing the name of the person engaged in distilling and denoting the business in which engaged, in violation of 26 U.S.C.A., Section 5180, 5681(c).

/s/ **Floyd M. Buford**
United States Attorney

/s/ **Geo. W. Hadaway**
Foreman of the Grand
Jury.

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ENDORSEMENTS OF REVERSE

At the direction of the Court, we the Jury, find the defendants, Not Guilty, on Count 4. This January 16, 1962.

/s/ Eugene Rault
Foreman

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT of GEORGIA
AMERICUS DIVISION**

THE UNITED STATES OF AMERICA

vs.

**ROY LEE BARRETT
JACKIE HAMILTON GAINES
CLEVELAND JOHNS**

INDICTMENT

Vio: 26 U.S.C.A. 5179(a), 5601(a),
5173, 5602, 5180, 5681(c).

A True Bill:

/s/ Geo. W. Hadaway
Foreman

[fol. 4]

Filed in open court this 15th day
of August A.D., 1961

/s/ John P. Cowart
Clerk.

4.
I, Roy Lee Barrett having been advised of my Constitutional rights, and having had the charges herein stated to me, plead Not Guilty In Open Court, this 15th day of January, 1962

/s/ J. Sewell Elliott
Atty. for Defendant

I, Jackie Hamilton Gainey having been advised of my Constitutional rights and having had the charges herein stated to me, plead Not Guilty In Open Court, this 15th day of January 1962.

/s/ J. Sewell Elliott
Atty. for Defendant

I, Cleveland Johns, having been advised of my Constitutional rights, and having had the charges herein stated to me, plead Not Guilty In Open Court, this 15th day of January, 1962.

/s/ J. Sewell Elliott
Atty. for Defendant

IN UNITED STATES DISTRICT COURT

VERDICT—January 16, 1962

We, the jury find the defendant Guilty on Counts 1, 2 & 3 this 16th day of January, 1962.

/s/ Ethridge Paulk
Foreman

[fol. 5]

TRANSCRIPT OF EVIDENCE AND CHARGE OF COURT

(Witnesses called, sworn and sequestered.)

W. W. WILLIAMS

being called by the Government testified as follows:

DIRECT EXAMINATION

BY MR. DAVIS:

Q Will you state your name?

A William W. Williams.

Q Mr. Williams, what is your occupation?

A I'm an investigator with the Alcohol and Tobacco Tax Division.

Q How long have you been so engaged?

A Five years.

Q Have you ever seen the defendants in this case?

A Can you identify them?

A Yes, sir.

Q You know them by name?

A Yes, sir.

Q Point them out to us.

A That's Cleveland Johns with the bow tie on, Jackie Hamilton Gainey with the checked shirt, and Roy Lee Barreft on the end of the table.

A Have you ever had occasion to investigate these defendants?

A Yes, sir.

Q What crime was it in connection with?

[fol. 6] A It involved an illegal whiskey distillery.

Q Was it about August 15, of 1961?

A I believe it was March 25 of 1960.

Q All right, relate to us then under what circumstances you saw this defendant—these defendants on March 25, 1960?

A On the morning of March 25, 1960 I was at the distillery with officers Charles Huguley, Bobby Oliff, Roy Cook, Harold Pike and Roy Blont. About 4:40 a.m., in the morning, a Dodge truck came to this distillery. Jackie Hamilton Gainey got out of the truck with a flashlight

and Officer Oliff arrested him. I went up to the truck then and Barrett and Johns were in the cab of the truck. They rolled the glasses up and locked the door and put the truck in reverse and tried to back out of the still yard, and we arrested them. We had to break a glass to get into the truck and we arrested both men, and on the truck there was a cylinder of butane gas, a full cylinder.

Q What else did you find?

A Well, at the still there were two 2250 gallon metal tank stills and 4500 gallons of mash, and the still was being fired with butane gas. There 8 cylinders at the still.

Q How long have you known the still was there?

A Well, I had been to this still the day before. This — was my second time at the still.

Q What county was it in?

A Macon, County—Dooly County, seven miles west of Unadilla.

Q Was this a moonshine distillery?

A Yes, sir.

[fol. 7] Q Could you tell how long it had been in operation?

A It was a new outfit and never had been operated.

(Recessed 12:30-2:45)

Q Mr. Williams, you testified about the still that you discovered. Let me ask you this: was that still set up for operation?

A Yes sir, it was.

Q How much mash did you find there?

A 4500 gallons.

Q What was the size of these still tanks?

A There were two square still tanks used as fermenters that would hold 2250 gallons each.

Q Approximately how much moonshine liquor would that make?

A That would have made between 450 and 500 gallons.

Q Are these the men that you found at that still?

A Yes, sir.

Q You are sure?

A Yes sir.

MR. JOE DAVIS: If Your Honor please, we object to what this quantity of mash, or whatever it was referred to as, would make. There is no evidence of any possession here, no charge of possession. It's immaterial and irrelevant, pure speculation. There are too many variables involved to let him state that it would make so and so.

THE COURT: You say there is no charge of possession? [fol. 8] You mean no charge of possession of whiskey?

MR. JOE DAVIS: That's right, sir.

THE COURT: What does the first count charge? Possession of the distillery?

MR. JOE DAVIS: Yes sir.

THE COURT: I overrule the objection.

Q (Mr. Bill Davis) Mr. Williams, did any of these people that you found at that still make a statement to you?

A Yes sir.

Q Did you identify yourself as an Alcohol & Tobacco Tax officer?

A Well, we told them that we were federal officers when we arrested them.

Q You identified yourselves as federal officers?

A Well, I don't know whether we said "federal officers" or not, but two of the defendants knew me from prior meetings.

Q They know that you were a revenue agent?

A Yes sir.

Q Did you advise them of their rights, constitutional rights?

A Yes sir.

Q What kind of statement did they make? What did they tell you?

A Roy Barrett told me that this distillery belonged [fol. 9] to all of them and that they had set it up a few days before, and he stated that they had come down there the day we arrested them to make the first run.

Q Is that this man at the end of the table here that told you they all owned that still?

A Yes sir, man with the glasses on sitting at the end of the table.

COLLOQUY BETWEEN COURT AND COUNSEL

MR. ELLIOTT: May it please the Court, in the interest of time, and even though there is some confusion in the court room, I would like to move the Court to allow me to read my written statement that this witness may have made with reference to the testimony he has given.

MR. BUDFORD: We have no objection to him seeing the statement that Mr. Williams is referring to.

THE COURT: Very well.

MR. ELLIOTT: And I believe Mr. Davis has a motion.

MR. JOE DAVIS: If Your Honor please, at the conclusion of Mr. Williams' direct testimony, all of these defendants, collectively and individually, *move to exclude* it from any record in this case because it appears conclusively, we submit, that it is substantially the same testimony concerning a transaction or event that was testified to by Mr. Williams in the case of Criminal No. [fol. 10] 7824, Macon Division of this Court, which involved the same three defendants here on trial, among others, and that to permit that testimony to go before this jury would amount to placing each of these defendants in double jeopardy for an offense on which they have already been tried and which has been partially disposed of. I purposely waited until this time to make the motion for the reason that even though, assuming the conspiracy indictment in Macon and the substantive indictment here in the Americus Division are on their face different, it now appears that the evidence of this witness to support the substantive counts here in the Americus Division is substantially the same testimony to which he testified in Macon, Georgia, as to the same still on this same date and as to these three defendants, identically the same transaction, same date, March 25, 1960. Therefore, it is using the evidence again and thereby placing each of these defendants in double jeopardy. I make that motion collectively and individually as to each of the defendants.

Further, as to certain of the defendants, *I move to ex-*

clude it on the basis of collateral estoppel, because even though I do not have in my possession an opinion which has recently been handed down, I am informed that certain rulings have been made by the Fifth Circuit Court of Appeals finding that certain evidence in the Macon case was insufficient as to two of these defendants, and therefore, by virtue of collateral estoppel they can not come in now and use this evidence again because it has been determined that in fact such evidence, or such factual [fol. 11] situations did not exist.

THE COURT: All right, Mr. District Attorney, what do you say to this motion?

MR. BILL DAVIS: May it please the Court, I would like to remind Mr. Davis at this point that there is a difference in a conspiracy and in a substantive crime that we are trying here today. These defendants conspired along with 6 or 8 other bootleggers, as he well knows, conspired, combined and confederated to commit a conspiracy to violate the liquor laws in the Macon division of this court, and that is what they were tried for. We are trying them down here today on a substantive count, a different crime, an independant crime that they committed in this division, this area. (Conferring with the District Attorney)

MR. BUDFORD: What I asked Mr. Davis to call the Court's attention to, Your Honor, the ruling of the Fifth Circuit Court of Appeals dealt entirely with the conspiracy charge. I don't know whether the Court has had an opportunity to read it or not. I just read it this morning and furnished it to Mr. Davis and Mr. Elliot.

The Court made no ruling on the charge that we are not trying. It dealt entirely, as Mr. Davis has pointed out, with the conspiracy charge, and this is a substantive charge here. We say this jury should have this evidence and if the jury and the Court believe it that we are entitled to a conviction.

[fol. 12] THE COURT: Do you have the indictment in the other case and the indictment in this case? Be glad to look at them.

MR. JOE DAVIS: If Your Honor please, I have a printed copy of the record which was filed before the

Court of Appeals. Of course, I am assuming the Court will take judicial notice of the indictment pending in this case in another division but—

MR. BUFORD: We have no objection to the Court looking at the printed record.

MR. JOE DAVIS: I would like to make an additional statement before Your Honor gets through reviewing the indictment. We submit that the only possible theory under which any conviction in this case here could be sustained under the evidence as presented by Mr. Williams, is under some form of agreement or understanding or conspiracy between these individuals who went up to this still, which admittedly they did. Therefore, the facts of this case under which a conviction has to be sustained are similar to the facts of the other case; that is the other case was dependant upon some agreement or understanding and the theory of this prosecution will have to be, we submit, under some theory of understanding or agreement, and therefore by virtue of double jeopardy on the one hand or, in the event the circuit Court has held that the other evidence is insufficient, by virtue of collateral estoppel they can't go into it.

[fol. 13] THE COURT: When was the conspiracy indictment returned?

MR. BUFORD: Our recollection is both indictments were returned by the same grand jury on the same date, and the reason these counts were not incorporated in the conspiracy indictment is the venue question, the very question that the Circuit Court was talking about in this recent opinion. Of course, we couldn't charge the substantive offense in the Macon Division on matters that took place in the Americus Division.

MR. JOE DAVIS: The conspiracy indictment was returned in February of 1961, if Your Honor please, because they entered pleas of not guilty on April 17, 1961.

MR. BUFORD: That might be correct. I just don't have the information here.

MR. JOE DAVIS: This indictment was returned, incidentally, after the return of the conspiracy indictment; after the case had been tried, a matter of fact.

THE COURT: When was the conspiracy case tried?

MR. JOE DAVIS: April Term 1961.

THE COURT: And then in August 1961, they were [fol. 14] indicted for the substantive offense?

MR. JOE DAVIS: I believe so, yes sir.

THE COURT: And the conspiracy indictment did not contain but one count and that was a conspiracy count. Is that correct?

MR. DAVIS: Yes sir. One of the overt acts pertains to this date and this activity in Dooly County, Overt Act 7, and the transcript of evidence on page 1 Mr. Williams testified substantially what he just testified to.

MR. BUFORD: But in support of a conspiracy charge, not a substantive charge.

MR. JOE DAVIS: We concede that and we realize it is dependant on the peculiar facts of the case. That's why we said on the face of the two indictments they are separate and distinct, but if it develops as a matter of fact that the only theories under which convictions can be sustained are one and the same, that is some agreement or understanding, then it is double jeopardy, or in want of that, collateral estoppel.

COURT: Will someone hand me the decision that you refer to? (Mr. Bill Davis complied.) Anything further?

MR. JOE DAVIS: Only this, Your Honor. In view of that opinion you have just read the evidence in this [fol. 15] case, we submit a conviction in either instance would depend upon some sort of aiding and abetting or some sort of conspiracy or understanding. We say the Fifth Circuit determination of that question is determinative of the issue here, because under the evidence now we submit that any so-called conviction would have to depend upon that in the absence of any testimony that they were seen working there or other evidence to indicate any ownership or possession of it. That's why we say the factual situation here and there, as to particularly Barrett and Gainey, in such instance will have to depend upon some sort of agreement or understanding or aiding and abetting theory and it has been determined adversely to the Government.

THE COURT: Well, as the Court stated in the case which you handed up, "It has long been recognized that

the commission of the substantive offense and a conspiracy are separate and distinct offenses. Thus, with some exceptions, one may be prosecuted for both crimes." I am inclined to think that this particular case does not fall within one of those exceptions, particularly in view of the fact that one of the contentions in the trial of the conspiracy case was that if anything took place it took place in a different division and not in the Macon Division, and the venue did not lie in the Macon Division. So I am going to *overrule the motion* and let the case proceed.

[fol. 16]

CROSS EXAMINATION

BY MR. ELLIOTT:

Q Mr. Williams, you stated that Mr. Gainey—beg your pardon, Mr. Barrett, I believe, made a statement to you about this distillery?

A Yes sir.

Q Where were the two of you when he made that statement?

A I don't remember exactly. I couldn't say for sure.

Q Well, were you at the still or was it back in the office, or where. Do you know?

A Well, it had to be at the still because, I remember now, after they were arrested I took the truck and the cylinders and the water pump that was at the still and came back to Macon and Mr. Hugueley brought them on to Americus and arraigned them. It was somewhere in the vicinity of the still.

Q On that same night or morning?

A Same morning, yes sir.

Q Was Mr. Johns around when he said that?

A Well, I don't know whether Mr. Johns was standing right there beside him when he said it or not.

Q Well, I'm asking you specifically was that statement made by Barrett in the presence of Johns?

A I don't know whether it was or not.

Q In other words, you cannot testify that it was?

A No sir.

Q. How about Mr. Gainey?

A. I don't remember that either.

[fol. 17] Q. In other words, your testimony is not that Barrett made such a statement in the presence of the other two?

A. That's my testimony. I don't know whether he made that statement in the presence of the other two or not.

MR. ELLIOTT: On the basis of that background, Your Honor, I ask for instructions to the jury with reference to any such statement.

THE COURT: Yes sir. Member of the Jury, any statement which one defendant, for instance Mr. Barrett, may have made would not be admissible against the other two defendants. That would be hearsay as to them. It would be admissible only as against the person making it and you should consider it only as against Mr. Barrett, but not as against either of the other two defendants.

Q (Mr. Elliott) All right. Now, we have talked a little bit about this conspiracy trial. Were these three men convicted in Macon in April of last year at this conspiracy trial?

A Yes sir.

Q Did you testify in that case?

A Yes sir.

Q Did you testify about this still?

A Yes sir.

Q Well, Mr. Williams, are you sure Mr. Barrett made a statement to about that still?

A Yes sir, I am.

Q Well, why didn't you testify about that at the trial [fol. 18] last April?

A Well, because I didn't have that statement. I was testifying from a statement that Mr. Ferguson had written for me and that information was in that statement when the conspiracy was tried in Macon.

Q In other words, you all testify according to statements that somebody writes for you and gives to you. Is that what you are saying?

A If the truth is in them, yes sir.

Q Who wrote this one you are testifying according to today?

A I did.

Q How can you be sure?

A Well, because I make my own statements and that statement is one that I made.

Q You didn't do it in April, did you?

A No sir. The date is on the heading of the statement, day it was made, four or five days after the still was seized.

Q All right now. How many cylinders—what was on this truck when it drove in there?

A There was one full 30 gallon butane gas cylinder.

Q You sure it was one?

A Yes sir.

Q You remember that?

A Yes sir.

Q Well, let me refer to the record in this conspiracy case that has already been identified and refresh your memory. I want to ask you a couple of questions with reference to your testimony there. Question: "How many butane gas cylinders were on that truck in Dooly County [fol. 19] ty?" That's the same still we are talking about?

A Yes sir.

Q Answer: "In Dooly County? Q. Yes. A. There was 9 butane gas cylinders seized and I don't remember whether all of them were on the truck or not. Q. How many were on the truck? A. I don't remember how many were on the truck. Q. Didn't you record that in your report? A. I said there was 9 butane gas cylinders sealed and I don't know whether all of the cylinders were on the truck or not. Q. Do you know whether or not any was transported down there in that truck? A. Yes sir. Q. Well, how many? A. I don't know the exact number. There were 9 at the distillery. Q. Well, how many were on the truck? A. Well, I don't know. Q. Is there any way to ascertain how many were on that truck? A. Some of the other officers might know, but I know there were 9 cylinders seized in connection with this distillery and I don't remember how many of these 9 were on the truck."

A That's correct.

Q That what you testified to?

A There was 9 cylinders seized and one was on the truck and 8 was at the still.

Q But that's your testimony back in April?

A Yes sir, that's correct.

Q Well, let me ask you this, and I'm reading again from the transcript, and it says—this is your testimony in answer to a question: "All four men—er—Johns, Gainey and Barrett drove in in a 1955 Dodge Truck—" [fol. 20] And those are the three defendants down here that I named, aren't they?

A Yes sir.

Q "—drove in in a 1955 Dodge Truck to this still we were watching and we arrested all three men when they drove into the still yard and stopped, and the truck was loaded with butane gas cylinders." You recall that testimony?

A I might have, yes sir.

Q Well, if there was just one on there you exaggerated by saying it was loaded, didn't you, Mr. Witness?

A Yes sir, I sure did.

Q And that was in the court room in the other case, wasn't it?

A Yes sir, that was in Macon. It's like I said there, some of the other officers might remember, and I have discussed this case with—

Q Mr. Williams, I'm talking about your testimony.

A Yes sir, that's my testimony.

MR. BUFORD: May it please the Court, I think he has a right to explain his answer, and that's what he's trying to do.

THE COURT: Yes.

A It's like I told you in Macon. Some of the other officers might remember, and I have discussed this case with some of the other officers and I know what was on the truck now.

Q But you weren't very careful about your testimony in Macon when you said those things, were you?

[fol. 21] A Well, I didn't intend to tell any lies and I don't think I did tell any lies.

Q But you were relying on hearsay, with reference to your testimony under oath, weren't you?

A No sir, I was relying on my memory and the statement that I had, and testifying to the best of my ability.

Q Well, you said that you were relying on what the others said, didn't you, and that's the reason you stated that?

A What who said?

Q Is that what you said?

A No sir, I didn't say I was testifying to what somebody else said. I was testifying to what I remembered.

Q But you did testify that that truck was loaded with gas cylinders when he dorne in there, and that was back in April?

A If that's what is in the testimony, I did, yes sir.

Q Now how many of you revenue officers were down there at this still?

A Mr. Hugueley, Oliff, Blount,—

Q Just tell me how many, if you will. I don't think it's necessary to name them all. If you want to I don't mind, but I just want to know how many.

A There was six of us, I believe.

Q How many vehicles did you come there in?

A I'm not sure. I don't even remember. We were not in a vehicle at this still, though.

Q Well, do you remember whether you came in more than one vehicle?

[fol. 22] A No sir, I do not.

Q Which side of the truck did you come up on at the time these men were arrested?

A I came up to the driver's side.

Q Did you know what was going on on the other side?

A Well, I saw investigator Hugueley on the other side trying to get the door open.

Q Are you sure about that, Mr. Williams?

A Yes sir, I'm positive about that.

Q There was a little bit of excitement there, wasn't there?

A Yes sir, they were trying to drive away from the still and had the windows rolled up and the truck was in reverse and just so happened that they had stopped in a wet place and the wheels were spinning.

Q Isn't it true that that car choked, that vehicle was hard to start and choked down.

A The motor was running and the wheels were spinning while we were trying to get the doors open.

Q Well, isn't it true that Mr. Gainey had opened the door on the other side and that door was still wide open and never was closed before the arrest?

A Mr. Gainey got out of the truck when they first stopped in the still yard with a flashlight. They drove to the still, it was still dark and somebody in the truck was shining a flashlight. They came in without headlights. When the truck stopped Mr. Gainey got out of the truck with a flashlight and came down toward the still and that's when we flushed them, and Mr.-er-
[fol. 23] Q You still haven't answered my question.

A Well, I don't know whether the door was closed at that time or not.

Q Just let me ask you my question and if you don't understand it I'll repeat it, but I'm asking you, do you know whether or not that door over on the other side, after Gainey got out, was never closed until after the arrest?

A I know the door was closed when Investigator Hugueley was trying to get it opened.

Q In other words, you say that after Mr. Gainey got out that the door was closed prior to the arrest of the two men in the vehicle?

A Yes sir.

Q Are you sure about that, Mr. Williams?

A Yes sir, I'm sure about that.

Q And you were over on the other side?

A I was on the driver's side, yes sir.

Q And the motor was running and wheels were spinning and you were beating out the glass with your pistol?

A No sir. I was beating out the glass with my flashlight.

Q Do you have a pistol?

A Yes sir.

Q Now this still—you have testified as to how many gallons of mash?

A 4500

Q What does that consist of primarily?

A Primarily water is the main ingredient.

[fol. 24] Q In other words, when you say that many gallons, most of that is just plain water, isn't it?

A No sir, after it ferments it's mash.

Q Well, actually it is primarily made up mostly of water.

A Water and sugar and wheat bran.

Q Mixed together? Now had this still been operated?

A No sir.

Q Had you been to that still before?

A Yes sir.

Q Was there anybody there?

A Not when I was there, no sir.

Q When was that?

A That was the night before the 25th, would have been the night of the 24th.

Q Was it ready to run that night before?

A Yes sir.

Q You feel like it could have been fired up the night before?

A Yes sir.

Q Well, why didn't you stay there and watch it that night then?

A Well, when we—we went out to get some help and we came back in there after midnight on the morning of the 25th.

Q Isn't it true that you all left that still because it wasn't quite ready and came back at a time when you thought it would be ready?

A No sir, that's not true.

Q Had this still ever been operated?

A No sir.

[fol. 25] Q Had any whiskey been made down there at that time?

A No sir.

Q How long have you been an investigator, Mr. Williams?

A Five years.

Q In your experience as a revenue investigator is there anything unusual about certain people owning stills and other people being sent in there to run them?

A No sir.

Q Is there anything unusual about one person setting up a still and then other people being sent down there to operate that still?

A No sir, that's not unusual.

Q In fact it's a very frequent thing, isn't it, that that's the way it's operated?

A Well, yes sir, it's quite frequent.

Q And this still and this truck and these defendants are the very same ones that we talked about as being the Dooly County still in this record on this conspiracy case?

A Yes sir.

Q Now, on the night in question, March 25, 1960, did you see anybody working at that still?

A No sir.

Q Operating that still?

A No sir.

Q Was there anybody down there at that still when you got there?

A On what date?

[fol. 26] Q On the night in question?

A No sir.

Q Was there anybody down there carrying on the business of a distiller?

A No sir, wasn't anybody there when we first got there on the 25th.

Q And these people drove up in a truck, drove up to the vicinity of the still and stopped the truck?

A Yes sir, they drove down a field road through a little wooded area without lights on to this still.

Q I say they drove up to this still?

A Yes sir.

Q And that's what they did?

A Yes sir.

RE-DIRECT

BY MR. BILL DAVIS:

Q Mr. Williams let me show you this copy of your statement and ask you when you wrote that up?

A I wrote that statement March 29, four days after we seized this still.

Q That was how many days after you made the arrest?

A Four days.

Q One other question, you testified there were 9 cylinders seized both on the truck and at the still?

A Yes sir.

Q Was the cylinder which was seized on the truck the same type as the ones that were already at the still? [fol. 27] A Yes sir, it was, 30 gallon butane gas cylinder.

Q Same kind?

A Yes sir.

AMOS BARLOW

being called by the Government, testified as follows:

DIRECT EXAMINATION

BY MR. BILL DAVIS:

Q You are Mr. Amos Barlow?

A Yes sir.

Q Where do you live?

A I live down here in Dooly County, down in Byronville.

Q You know a man named Cleveland Johns?

A No sir, I don't know him. I have seen him though.

Q Do you see him here today?

A Yes sir, that's him sitting right over yonder behind that other man.

Q In the blue suit?

A Yes sir. Ain't it him?

MR. ELLIOTT: May it please the Court, I object to the District Attorney leading the witness. He wants to point out the man he ought not to lead him by saying "in the blue suit".

Q (Mr. Davis) Mr. Witness, come back here and point him out. Let's be sure you know which one is which. Watch your step there. Come on back here and point out the man you know as Cleveland Johns.

A (Leaving the witness stand.) It's that man right there, (pointing) is the one they said was Cleveland Johns.

[fol. 28] Q This man right here?

A Yes sir, that's Cleveland Johns, what they told me his name was.

Q All right, come on back and take the stand now.

A All I know, they told me.

Q Did Cleveland Johns offer to pay you some money?

A Yes sir. He said if I let him come down there and do a little business.

Q What kind of business?

A Didn't say. Just a little business. Amount to \$15 a week to me. He didn't say what he was going to do. I didn't even know where it come from. I didn't know nothing about that.

Q Where did he want to do business?

A Sir.

Q Where did he say he wanted to do business?

A Down there on the creek, swamp. He didn't say what he wanted to do. Just said he wanted to go through there and do a little business.

Q Down by the branch?

A Down there in the woods. Just said "down there," and said "if you agree with me to let me go down there and do a little business there it will amount to \$15 a week to you." Said, "That will help you buy groceries, won't it?" I said, "Why, yes sir."

Q Was it close to a creek where he said he wanted to do business?

A Right there in the edge of my yard. I didn't know the man. I hadn't never seen him before.

[fol. 29] Q Did he pay you what he offered to?

A Sir?

Q Did he ever pay you what he offered to?

A No sir. He ain't never paid me. If he paid you anything he paid something! He never paid me.

Q He never did pay you?

A Not a penny! Of course he weren't there making no liquor. He weren't there but just a week. I mean it had been a week since he went down there.

Q Well, did you see him going down there?

A No sir. He went in the night.

MR. DAVIS: I move to strike that, Your Honor. He said he didn't see him. It's a rank conclusion.

THE COURT: Yes, I sustain that motion; grant the motion to strike out that he went in the night. That would be pure hearsay. Pay no attention to that, Members of the Jury.

Q (Mr. Bill Davis) What county was this in, Mr. Barlow?

A Dooly County.

Q Do you recall about what date it was?

A No sir, I ain't kept up with nothing like that.

Q Let me refresh your memory. Would it have been along in March of 19—

MR. JOE DAVIS: Object to him leading him, Your Honor.

THE COURT: Mr. District Attorney, don't lead the witness now. Don't lead him any more, because we are [fol. 30] not supposed to lead witnesses.

MR. DAVIS: May it please the Court, I just wanted to refresh his recollection.

THE COURT: I know, but don't lead him. That's what they are objecting to and I am sustaining the objection, and you are going to have to learn to interrogate witnesses without leading them.

Q (Mr. Bill Davis) All right, Mr. Witness, do you have any idea when that date was?

A When the date was?

Q When Mr. Johns came to you to tell you he wanted to do business down by the creek?

A No sir, but it was in March, but I don't know what time it was or nothing about it.

Q You know it was in the month of March?

A Yes sir.

Q Do you have any idea what year?

A Well, it was just about the third year I been messed up in it, I believe. Ain't it about the third year.

Q Being messed up in what?

A In this here, about his going down there. I don't know nothing about what he went for. He just went down there, I knowed that.

Q All right, sir. But you do know it was in March?

A Somewhere along in March.

Q All right.

[fol. 31]

CROSS EXAMINATION

BY MR. ELLIOTT:

Q Mr. Barlow, I don't recall, which door did you come in when you came in the court room here?

A I don't know just exactly which door it was. I just come in the door, is all I know.

Q Did you come in this one right here?

A I don't remember what door I come in. I just come in here cause they told me to.

Q But did you walk down a hall and come in the door?

A Yes sir. I was standing down there about the next room over there, and that man come and called "Amos Barlow" and I come.

Q What I want to know is if, before you were sitting there, were you brought up here once this morning?

A Before today?

Q No, to day, but before you came up here to testify.

A Them there folks went down there and got me and brought me up here and it was somewhere along after dinner time. I know I ain't had nothing to eat. I know that.

THE COURT: You haven't had any dinner yet?

A No sir.

Q You say you have not had dinner yet?

A No sir.

Q Well, do you know when everybody else went to dinner?

A No sir.

[fol. 32] Q Where have you been?

A Sir?

Q Where have you been since you have been here?

A Since I been here?

Q Yes sir.

A I just been back there, you know, setting down there in that room like them folks told me to.

Q Have you been down on the floor below here, or up here?

A They brought me on up here, when I come.

Q Well, now, did the officers before, while you were in that room, did anybody bring you out here to that door?

A Bring me?

Q Yeah. Anybody ask you to walk out there?

A Whenever I come in here?

Q No, before you came in here this time?

A Well, I don't know what man it was but he told me I could come on in here and set down in that big hall up there. I was hot out there.

Q What I'm asking you specifically is did somebody bring you to one of those glass windows and ask you to look in here and look at these men sitting here at the table?

A Yes sir.

Q And did they point out to you who Mr. Barlow—who Mr. Johns was?

A No sir. I seen him though.

Q They did bring you up here to look in?

A Yes sir.

[fol. 33] Q And they told you where he was sitting?

A Yes sir.

Q And that was within a half an hour or so before you came in here to testify?

A I don't know how long. I expect it's been an hour or two. I don't know how long it's been.

Q But they brought you up to one of those little windows and had you look in?

A Yes sir.

Q And look at these people sitting in here?

A Yes sir.

Q Was I sitting in here at that time?

A I don't know sir.

Q How many people were sitting at that table at that time?

A I don't know.

Q But they pointed to this table, didn't they?

A Yes sir.

Q And Mr. Barlow, did they charge you with anything up there in Macon with reference to this?

A Put me under two years probation.

Q I say they did make a charge against you?

A No sir. I didn't have nothing to pay nothing with.

Q Yeah, but they prosecuted you, put you under probation?

A I ain't never had nothing. I ain't never been in nothing before and that was just brought on me just un-called for that way.

Q But they made a charge against you and disposed [fol. 34] of your case, didn't they?

A Put me under two years probation and told me they was through with me, and here I am done back up here, you see.

Q All right, I don't have any further questions.

A That's the way it is.

(Recessed 3:50-4:00)

Q I have one more question, Mr. Barlow: You say they put you on probation?

A Yes sir.

Q How many acres of land did you have down there that the still was located on?

A Thirty six and a half acres.

Q What did they do about that land?

A They sold it. Claim they sold it. They took it out of my hands.

Q You talking about the United States government?

A Somebody did. They sold it to the highest bidder and Richard Garvin bought it.

Q They took your 36 acres from you?

A And claimed \$900 against me, and wanted \$7,000.

Q In other words they took your land and credited you with \$900?

A Took it for \$900.

Q And they still want how much money from you?

A \$7,750 more.

Q How much money?

A \$7,750. Expecting me to pay and I ain't got nothing [fol. 35] to pay nothing with.

Q And that was all because of this still down there?

A That's what they said, yes sir.

Q Did you have anything to do with the still other than what you have told us?

A No sir. The Lord knows I didn't too.

Q No further questions.

A You all ready for me to go home now?

MR. BILL DAVIS: You can come on down now.

MR. ELLIOTT: We have no objections to his being released.

MR. BARLOW: I show hope it's over with too, cause I ain't never been bothered so with nothing in my life.

MR. ELLIOTT: While the next witness is on the way in, Your Honor, I would like to make a motion that any testimony that this witness Barlow gave with reference to Cleveland Johns be excluded as to the other defendants.

THE COURT: What is that now?

MR. ELLIOTT: Mr. Barlow testified with reference to a transaction between himself and Johns which was not in the presence of these other defendants and I would like the jury instructed with reference to any transaction [fol. 36] between one defendant having nothing to do with the other two.

THE COURT: Well, the conversation didn't purport to involve the other two defendants, did it? He said nothing about the other two as I recall.

MR. ELLIOTT: Unless it could be on the basis of a circumstance which is a conspiracy of confederation between the three, Your Honor.

THE COURT: Well, Members of the Jury, I will remind you, if counsel wants me to, that the witness Barlow did not say anything at all, whatsoever, against the other two men, so I don't see how you could say that what he did say would implicate them. He confined his testimony entirely, as I recall it, to Mr. Johns, so you will consider that testimony against Johns, but not against the other two.

R. J. OLLIFF

being called by the Government, testified as follows:

DIRECT EXAMINATION

BY MR. BILL DAVIS:

Q Are you Mr. Bobby J. Olliff?

A Yes sir.

Q What is your occupation?

A Enforcement officer with the State Revenue Department.

Q How long have you been so employed?

A Approximately three years.

Q Mr. Olliff, I'll ask you if you had the occasion to investigate the case that is on trial here today?

[fol. 37] **A** Yes sir.

Q Tell us under what circumstances you saw them?

A On March 25, 1960 in Dooly County about seven miles West of Unadilla, with officer Williams and officer Hugueley and several other officers we were at this distillery. At about 4:40 a.m. this 1955 Dodge pick-up truck come driving into the distillery yard and Jackie Gainey got out on the right hand side and started around, and then I arrested him and Officer Williams went to the driver's side and arrested Cleveland Johns. He was driving the car and Roy Barrett was in the car and Officer Hugueley went to the other side of the car, truck.

Q These men try to escape?

A Gainey started to running and I arrested him about 15 yards from that point.

Q Did you run him down?

A Yes sir.

Q Can you identify Gainey?

A Yes sir. The boy in the middle there with the red and black shirt on.

Q Can you identify Cleveland Johns?

A Yes sir. He's the one with the bow tie on.

Q Can you identify Roy Lee Barrett?

A He's the one with the glasses on.

CROSS EXAMINATION

BY MR. ELLIOTT:

Q Did you testify that you were on the side of the truck opposite from the driver's side?

[fol. 38] A No sir. I was on the driver's side.

Q On the driver's side?

A Yes sir.

Q Mr. Williams was over on that side too?

A Yes sir, he was with me.

Q Who was over on the other side?

A Officer Hugueley, Officer Pike, Officer Blount and Officer Cook.

Q Four of them over there?

A Yes sir.

Q Who else was over on your-

A They were surrounded on top of the hill there.

Q But now who was on your side?

A Officer Williams.

Q And yourself. Anybody else?

A No sir.

Q How many officers were there all together?

A Officer Williams, Officer Hugueley, Officer Blount, Cook, Pike and myself.

Q Six of you?

A I guess. Every how many that is.

Q But you and Mr. Williams were over on the driver's side and these other people were over on the other side?

A Yes sir.

Q Were you there when he beat the window out?

A I was there when he run up to the side of the car and arrested Mr. Johns. He was under the—

[fol. 39] Q Did you see him break the window?

A No sir, I didn't see him break a window. I was running Mr. Gainey.

Q You were running Gainey?

A Yes sir. He started running when he saw us.

Q How far was Gainey from the car?

A He got out on the right hand side of the truck and walked around it and he saw us and started running.

Q And you started running after him?

A Yes sir.

Q Was the door still open on the other side?

A I don't know.

Q You don't know anything about that?

A No sir.

Q You don't know anything about him beating out the glass?

A No sir.

Q Do you know who sold Mr. Barlow's land?

A Sir?

Q Do you know who sold Mr. Barlow's land?

A Would you mind repeating that?

Q Mr. Barlow, you know who he is?

A Yes sir.

Q He owned that piece of land that this still was on, didn't he?

A I don't know.

Q You don't know?

A No sir.

[fol. 40] Q Well, do you know whether that land has been sold?

A I don't know.

Q By the government?

A I don't know.

Q Don't you know that the U.S. Government has condemned and sold that land?

A No sir, I don't know.

Q That comes under a different department from yours?

MR. BILL DAVIS: Now, may it please the Court, he has already said he doesn't know anything about the land and what happened to it.

MR. ELLIOTT: I'm asking another question now.

Q Do you know the—you are a state agent?

A Yes sir.

Q If it was the State of Georgia that took that land you would know about it, wouldn't you?

A Yes sir, I guess so.

Q So it must have been the federal government that took that land, if it was taken. Is that right?

A I guess. I don't know whether it was taken or not. I don't know.

Q All of this was a federal case from start to finish, wasn't it?

A Yes sir.

Q You were a state agent out there helping the federal men?

A Yes sir, I was assisting in the investigation.

[fol. 41] Q Now you have identified all of these men, haven't you?

A Yes sir.

Q You have seen them many times, haven't you, since that night?

A Yes sir, these three—

Q You saw them in Macon, during the trial there?

A Yes sir.

Q Seen them many times on other occasions?

A Yes sir.

RE-DIRECT

BY MR. BILL DAVIS:

Q Mr. Olliff, did Mr. Roy Lee Barrett make any kind of statement at the time of this arrest?

A Yes sir. He stated that the still belonged to all of them.

Q Just a minute now. Before you answer that let me ask you if he was advised of his rights before making the statement?

A Yes sir.

Q He stated in my presence that the distillery—

MR. JOE DAVIS: Object to that, Your Honor, unless he can show it was outside the presence of the other two defendants and lay the proper foundation with respect to that.

THE COURT: Unless he shows it was outside the presence of the other two?

MR. JOE DAVIS: The circumstances under which this statement was made, if it was by himself off to the side of the still yard I want to make an objection as to [fol. 42] the admissibility of it as to the others and not let it go in and have to technically wipe it out.

THE COURT: Well, Mr. District Attorney, do you mind asking him what Mr. Davis wants you to? That is whether the statement was made in the presence of the other two defendants or not.

MR. BILL DAVIS: Be glad to.

Q Mr. Ollif, was this statement made in the presence of the other two defendants?

A Yes sir.

Q It was?

A Yes sir.

Q They were within hearing range of the statement?

A Yes sir.

Q Would you tell us again what the statement was?

A Barrett stated that the distillery belonged to all of them.

Q This man right over here, Roy Lee Barrett?

A Roy Lee Barrett, the one with the glasses on.

RE-CROSS

BY MR. ELLIOTT:

Q Did you see any of these defendants down there at that still prior to the time that they drove up in that truck?

A No sir.

Q Did you see any of those defendants engaging in the whiskey business or the liquor business on March 25, 1960, the date in charge?

[fol. 43] A You mind repeating that.

Q In other words, you didn't see any of these three defendants around that still prior to the time that they drove up in the truck?

A No sir.

Q Did you see any of them working out there at the still?

A No sir.

Q Did you see any of them engaging in the business of manufacturing whiskey down there at that still?

A No sir.

Q Who advised Mr. Barrett of his rights?

A Investigator Williams.

Q How? What did he tell him?

A I don't recall the exact words he told him.

Q I'm not talking about the exact words. I'm talking about just what you recall he told him.

A I don't recall right off-hand.

Q Well, what do you mean when you advise somebody of their rights? What does that mean?

A That anything they say can be used against them in case they stand trial.

Q And then Mr. Barrett freely and voluntarily gave the statement?

A He said—he stated that the still belonged to all of the men.

Q I'm asking you the circumstances under which he gave you the statement. How many times did Mr. Williams ask him?

[fol. 44] A I don't recall.

Q Did he ask him more than once?

A I don't recall.

Q You don't know anything about that?

A No sir.

MR. JOE DAVIS: May we let the record show we are making the same objection to this witness' testimony that we made with respect to the testimony of Agent Williams?

THE COURT: You mean with reference to the conspiracy charge and so forth?

MR. JOE DAVIS: Yes sir, the motion we made about

the conspiracy charge and substantially the same evidence.

THE COURT: Yes sir, same motion, same ruling.

MR. JOE DAVIS: All right, sir.

MR. BILL DAVIS: The Government rests.

INTRODUCTION OF EVIDENCE BY DEFENDANTS

MR. JOE DAVIS: If Your Honor please, we would like to tender in evidence the record which we handed up to the Court a few minutes ago. We will stipulate that there are literally hundreds of pages, probably, which are not applicable, but at the proper time we would like to strip those out, but—or if the Court would like me to [fol. 45] I can go through the record and read those pages that we want introduced at this time. That is in order to perfect the grounds of the motion that we made heretofore as to the factual evidence adduced at the other trial, and the facts and circumstances adduced at this trial.

THE COURT: Well, it's agreeable with me to let the entire record go in for that purpose and to be culled and reduced to whatever portion counsel may agree upon.

MR. DAVIS: All right, sir.

THE COURT: And if you can't agree then either side can consider that all of it is in or any portion that either side wants. Is that satisfactory?

MR. BILL DAVIS: We have no objections, Your Honor.

THE COURT: Very well.

MR. ELLIOTT: The defense rests, Your Honor.

MR. JOE DAVIS: If Your Honor please, technically, before we rest we have a motion to make at the end of the Government's evidence, and I would like to make it now, nunc pro tunc, as of that moment, and I think it ought to be made outside the presence of the jury.

[fol. 46] THE COURT: All right, let the jury retire.

(Jury retired, 4:25 p.m.)

**MOTION FOR JUDGMENT OF ACQUITTAL AND
RULING THEREON**

MR. JOE DAVIS: If Your Honor please, comes now the defendants Roy Lee Barrett and Jackie Hamilton Gainey and Cleveland Johns, individually and collectively, and at the close of the government's evidence make a motion for a judgment of acquittal as to counts 1, 2, 3 and 4 in indictment No. 1411 on the following grounds:

The evidence is wholly insufficient as a matter of law to sustain any conviction on the indictment as drawn. It should not go to the jury. The Government has wholly failed to sustain its burden of proof in overcoming the presumption of innocence that each of these defendants entered upon the trial of this case with, and for that reason the judgment of acquittal should be entered as to each defendant.

Furthermore, we move in an alternative motion, that the indictment be quashed or else a judgment of acquittal be entered as to each of these defendants on the ground that it amounts under the evidence in this case to each defendant having been placed in double jeopardy under the Fifth Amendment of the Constitution of the United States, because it clearly shows that under no theory of this case can a conviction be sustained other than by means of some agreement or understanding between these individuals according to the evidence in this case and that they have already been tried on the conspiracy case involving the same factual situation, and for that reason [fol. 47] the judgment should be granted.

Going one step further as to Jackie Hamilton Gainey and Cleveland Johns—as to Roy Lee Barrett and Jackie Hamilton Gainey, the evidence is absolutely, we say, the same insofar as the evidence in this case is concerned and the evidence in the other case, and that for that reason it amounts to double jeopardy as to them, and for the further reason that under a recent rule of the Fifth Circuit, which I am substantially incorporating in this motion, in the grounds that were urged before that as a matter of collateral estoppel Roy Lee Barrett and Gainey can not be and, indeed, should not be convicted of this case under this evidence since it would have to depend

upon an agreement or understanding, and that is exactly what they were convicted of, that's exactly what the Fifth Circuit, we submit, held to be lacking in the other case.

Furthermore, as a ground of the motion for each and every defendant herein, and with particular respect to Count 4, there is absolutely not one iota of evidence that either one or all of these defendants either worked at or aided in the working at or assisted in the commission of any working offense at any illicit distillery in Dooly County, Georgia.

With respect to Count 3 there is not one iota of evidence in this case that either or all of these defendants engaged in and carried on the business of a distiller of spiritous liquors as alleged in Count 3—Well, that's it. There is just absolutely no evidence, under admissions of the witness from the stand.

Under Count 2 we submit that there is absolutely no [fol. 48] evidence whatsoever, and indeed admissions to the contrary by the witness, that no one of these three defendants carried on the business of a distiller of spiritous liquors in violation of the section set forth in Count 2. There is no evidence of any aiding or abetting in the commission of that crime for which this evidence could go to the jury.

And as to Count 1, if Your Honor please, we say that the Government has wholly failed to show beyond a reasonable doubt that either one or all of these defendants possessed an illicit distillery on the date in question and in the manner alleged in Count 1. Suspicion, yes; abortive attempts to pay a certain sum of money to engage in a particular business that the witness himself said he did not know the nature of; and I submit, if Your Honor please, that it is almost comparable to an automobile carrying people up to the site of an illicit distillery. The automobile, as such, is not engaged in the violation of the law and if it is used merely for the purpose of transporting workers to a still then that automobile can't be forfeited. By the same token these men going up to, and even assuming they went in, the distillery site is insufficient as a matter of law to convict them of the offenses

with which they are charged. I'm not saying what would have happened had the Government waited five or ten minutes before they flushed this still. I'm talking about what happened. It was an instance, we submit, if Your Honor please, that was at most, for the Government, an attempt to commit a crime that was interrupted before it reached its normal objective.

[fol. 49] THE COURT: You have stated your motion?

MR. JOE DAVIS: Yes sir.

THE COURT: What does the Government say to the working count?

MR. BILL DAVIS: We will agree to dismiss the working count.

THE COURT: Very well, I will *grant the motion as to the working count and overrule it as to the others.*

MR. JOE DAVIS: And at this time, in order to get the record perfected as to the sequence of events, Your Honor, we tender into evidence the record that we have heretofore mentiond, and then we rest.

THE COURT: I thought we had already admitted that.

MR. JOE DAVIS: Yes sir, but the record will show that we made a motion for a judgment of acquittal technically after the time that we rested. I want it to show that we made it at the end of the Government's evidence. I don't think it amounts to anything.

THE COURT: But there is no use to introduce the record twice, is there?

MR. JOE DAVIS: No sir, but I just don't want the court to say you failed to—I mean any appellate court to state that you failed to make a motion at the end of the Government's evidence and therefore you waived [fol. 50] your privilege.

MR. TRUETT SMITH: If Your Honor please, we are not going to take advantage of Mr. Davis in this regard, and I want the record to show that.

THE COURT: Very well. I guess the usual ten minutes to the side is sufficient?

MR. ELLIOTT: One other thing, Your Honor, we want these motions to be made at the end of the Govern-

ment's evidence, and those that were overruled we would like to renew after we have rested.

THE COURT: Well, renew anything you want to renew.

MR. ELLIOTT: All right, I would like to renew all of the motions that Mr. Davis made at the end of the Government's evidence, also at the end of our evidence when we rest, those which were overruled by the Court.

THE COURT: Well, I take it the Government has finally rested now, and you have rested. Any additional motions you want to make now?

MR. ELLIOTT: I want to renew all of the motions made by Mr. Davis that the Court overruled.

THE COURT: Very well. I make the same ruling now that I made then.

MR. JOE DAVIS: This record has been identified as *D.1.*

[fol. 51] THE COURT: All right. Proceed with the arguments.

OBJECTION TO ARGUMENT BY GOVERNMENT COUNSEL

MR. BILL DAVIS: The second thing I would like to clear up. The way these counsel have tried to think that you were just enough not on the ball and not capable of clear thinking, to think that they could confuse you and make you think that these people were being held in double jeopardy, being tried for something they didn't do. You know, if you kill a man in Georgia then if you go over in Alabama and kill somebody else—

MR. JOE DAVIS: May it please the Court, there is no evidence of anybody getting killed in Georgia and somebody in Alabama and I object to it.

MR. BILL DAVIS: May it please the court, I just wanted to draw an analogy on the venue question.

THE COURT: Could you use some other illustration, rather than murder?

MR. BILL DAVIS: Yes sir. Well, you know, Gentlemen of the Jury, if you commit a crime in Georgia and you go commit one, say a bank robbery, in another state, you can be tried for both of them.

CHARGE OF THE COURT**(9:30 a.m. Jan. 16, 1962)**

Members of the Jury, on yesterday we concluded the [fol. 52] evidence and the argument of counsel in the case of the United States against Roy Lee Barrett and Jackie Hamilton Gainey and Cleveland Johns. They are all in court with their counsel, are they not? Yes. And now it remains only to submit the case to the jury with a brief statement of the law applicable to this case.

I charge you that the indictment which will go to your room with you does not constitute any evidence against the defendants, being only a written statement of the charges which the Government brings against them. Likewise their pleas of not guilty on the cover of the indictment do not constitute evidence in their favor, being simply their written denial of those written charges. The indictment on the one hand, however, and the pleas of not guilty on the other frame and point up to the issues which you are to try in this case and those issues are simply whether or not these defendants did the things that they are charged with doing in these counts of the indictment, and you will frame your verdict and thereby answer these questions for us, of course, solely on the basis of the evidence which you have heard in this court room during the trial. The evidence is to be controlling as to all of these questions of fact.

And, in that connection, I charge you that the evidence consists of what the witnesses said from the witness stand in response to questions propounded by counsel, and it consists also in whatever documentary evidence was introduced and admitted into evidence. It does not consist of or include any statements by counsel during the trial of the case. Statements made by counsel on either side are not evidence.

[fol. 53] Likewise, any statement made by the Court during the trial of the case is not evidence. So it is necessary to distinguish between a lot of colloquy that takes place during the trial of a case and the evidence in the case, and, for instance, arguments of counsel do not constitute evidence. Whatever they say to you, whether it is

the government's counsel or the defendant's counsel, that is not evidence. It serves a useful purpose in helping you analyze and understand and evaluate the evidence, but if counsel make statements which are not borne out by what the witnesses say and what the evidence shows then such statements do not constitute evidence.

Now you are the sole and exclusive judges of the facts in this case. That is your responsibility, to decide whether or not these defendants did the things which they are charged with doing.

To assist you in the performance of your important task the law places upon me the obligation of telling you, and the duty of telling you, what the law is, and it is your duty under your oaths to accept the law as I state it. Sometimes I state it erroneously. If so, I am subject to correction, and I am corrected. There are two courts above me and they don't hesitate to correct me if I am wrong. That is their duty. It is my duty to tell you the law as I see it, and whatever the presiding judge tells you the law is, that's the law, until and unless it is reversed and set aside by some appellate court.

We have no complicated questions of law in this case. I am simply saying that you are the sole and exclusive [fol. 54] judges of the facts in every case, but you take the law as it is stated by the Court in charge to the jury.

The Court will express no opinion in this case as to what the true facts are, because the Court would not want to invade the province of the jury and would want to leave those facts solely to your determination.

You are the sole judges as to the weight of the testimony and as to the credibility of the witnesses who testified before you, and in weighing the testimony and the credibility of the witnesses you may consider a number of factors, including the witness' manner and demeanor on the stand before you, the witness' feelings, his interest, his prejudice or bias, if any, his means of knowing what he testifies about, the probability or improbability of his testimony, the consistency or inconsistency of his statements, his intelligence or lack thereof, the reasonableness or unreasonableness of what he says, and also his personal credibility so far as that may legitimately appear from the trial of the case.

A witness testifies under a solemn oath to tell only the truth and ordinarily a witness is to be presumed to be observing that oath, but this presumption may be overcome by various measures of credibility which the jury will apply in terms of their every day common sense and experience with people and with events.

Now in this case, as in all other criminal cases, we enter upon the trial with the presumption that the defendants are innocent. That presumption, while not evidence in favor of the defendants, is in the nature of evidence on their behalf, being a presumption which casts [fol. 55] upon the United States the burden of proving the charge or charges that it brings against the defendants, and it is the duty and the burden of the Government to prove such charge and such charges beyond a reasonable doubt. But if and when the Government has done that then this presumption of innocence would entirely disappear from the case, because it is the evidence which is to control on all factual questions.

Now a reasonable doubt is not a whimsical, fanciful or conjectural doubt but it is a doubt founded in reason just as the words plainly imply. Very few propositions can be established beyond any possible doubt and the law does not require such an impossible standard. That standard applicable here is proof beyond a reasonable doubt. You may not convict a defendant upon a guess or a surmise or a suspicion, but you ought not to acquit a defendant on anything less than a reasonable doubt.

Now the indictment in this case is in four counts. The first count charges that these defendants had in their possession, custody and control a still and distilling apparatus for the production of spiritous liquors, set up without having the same registered as required by law. You notice that does not charge the ownership of the distillery. It charges that they had it in their possession and under their custody and control.

Possession may be defined as having personal charge of or exercising the rights of management or control over [fol. 56] the property in question. The Government does not have to prove the legal title to the distilling apparatus. Custody and control are the commonly accepted and generally understood incidents of possession.

Counts two and three charge that these three defendants carried on the business of distillers of spiritous liquors, Count two saying without having given bond as required by law, and Count three saying with intent to defraud the United States of the tax imposed thereon.

I charge you that it is not necessary, in order for the defendants to be guilty under these two counts which charge the carrying on of the business of a distiller, that whiskey actually have been completely manufactured at the distillery. For instance a farmer is in the business of farming during the springtime and before harvest season. Likewise a distiller can legally be in the business of a distiller before he completes the first run. The question is whether or not they were engaging in the business of distillers of spiritous liquors without having given bond as charged in Count 2 and with intent to defraud the United States of the tax imposed thereon as is charged in Count 3.

Count 4 charges that the three defendants worked in a distillery for the production of spiritous liquors. Now that count means legally that they actually worked, themselves, worked down at the distillery. Well, the evidence in this case fails to show that, So I am going to direct you to return a verdict of not guilty as to Count 4 in favor of [fol. 57] each of the three defendants.

In that connection I charge you that we have a statute of the United States which says he is a principal—or not in that connection, but in connection with the other three counts, the first three, I charge you that we have statute which says that he is a principal who directly commits the acts which constitute the offense, and he is also a principal who aids, abets, counsels, procures or induces the commission of the offense. In this jurisdiction they are all principals alike. We make no substantial distinction between principals and aiders and abettors or accessories. They all stand on the same footing. That is all who join in a crime or who aid or abet or counsel its commission or who procure its commission through others are partners in the crime and are, in the eyes of the federal law, equally guilty.

Now the evidence and the arguments in this case took a wide range. I remind you, therefore, that the issue for

you gentlemen, under your oaths, to decide under the evidence in this case is whether or not these three men did what they are charged with doing in Counts 1, 2 and 3 of this indictment.

The issue is not whether the Government should have sold the farm of Amos Barlow. Whether the Government should have sold the farm of Amos Barlow for taxes or not is not the issue in this case, and if you believe, under your oaths as jurors, and under the evidence in this case, that these three men did what they are charged with doing [fol. 58] in Counts 1, 2 and 3 it is your duty to convict them, under your oaths as jurors, whether or not you believe that the Government ought to have sold the farm of Amos Barlow. And, on the other hand, if you do not believe that they are guilty of these three counts or any one of them under the evidence in this case, it is your duty to acquit them whether or not you may think the Government ought to have sold the farm of Amos Barlow.

Now in that connection I charge you that the Congress enacted some statutes many years ago providing that, and looking toward, the forfeiture of property knowingly used by any person in an effort to defraud the Government of taxes. For instance, if I take my car and haul non-tax-paid whiskey in it with an intent to defraud the Government of the taxes, I, therefore, make my car subject to forfeiture.

Likewise, if I knowingly set up a distillery on my few acres of land with intent to use that distillery and that land for the purpose of defrauding the Government of its taxes on the whiskey, then there are certain statutes which contemplate or make possible the forfeiture of that land, and that distillery.

Taxes are imposed by the Congress of the United States upon whiskey and there is an occupational tax imposed upon those who engage in the business of distillers. The occupational tax is a certain named amount. The other tax upon the whiskey is so much per gallon. It is about \$9 a gallon on moonshine whiskey, and it is so much per [fol. 59] gallon according to the alcoholic content of the mash. So the amount of taxes due under the law is graduated according to the size of the operation. The

more mash and whiskey, the more tax is due. The less mash and whiskey, the smaller the tax due.

So the real question in this case is not whether or not Amos Barlow, under his evidence, rented his land to somebody—he mentioned Mr. Johns, I believe—for the purpose of doing some business, a little business, down in the woods by the creek or whatever Amos Barlow's testimony was. You will remember it. The real question is not whether Amos Barlow thereby made his property subject to a federal liquor tax. That is not the main issue in this case, as I have stated.

One other matter. There is a difference between a substantive offense and a conspiracy. A conspiracy is a crime which usually requires a little explanation, and yet, in a way, it is extremely simple. A statute of the United States simply says that if two or more persons agree together that they will violate a law of the United States, and then if either one of them does as much as one overt act in furtherance of that conspiracy then they are all or both guilty of the crime of conspiracy, and that is true whether or not the law which they intended to violate was ever violated or not. The agreement to do it, plus one overt act in furtherance of it constitutes that independent crime. And that crime may be prosecuted only in that [fol. 60] area, that judicial division, in which the agreement was entered into or in which any one of the overt acts was committed.

There is evidence in this case that these three defendants along with several others, were prosecuted up in the Macon Division for the offense of conspiracy, and that as a portion of the evidence in that conspiracy case evidence was admitted as to this Dooly County transaction which you have heard about in this case.

Now that, under the law, is a separate and distinct offense from the substantive offense of carrying on the business of a distiller and of possessing distilling apparatus in Dooly County, Georgia, and under the law a substantive offense as distinguished from a conspiracy is a violation of any statute other than the conspiracy statute, for instance, possessing distilling apparatus as charged in Count 1 and carrying on the business of distillers as charged in Counts 2 and 3.

These defendants could not have been tried in the Macon Division for the substantive offense charged in this indictment because Dooly County is in the Americus Division of the Middle District of Georgia and not in the Macon Division.

So I charge you that the commission of a substantive offense and a conspiracy to commit it are separate and distinct offenses and the mere fact that these three defendants were tried for a conspiracy to violate the liquor laws does not prevent their being tried in this court and [fol. 61] at this time for the specific offense charged against them in this indictment.

So, Members of the Jury, you will go to your room, you will recall the evidence in this case and the charge of the Court, and if you believe that these defendants are guilty you will convict them under your oaths. If you have any reasonable doubt about it then you will acquit them under your oaths.

As I said, let your verdict be not guilty as to Count 4, and then specify what it is with respect to each of the three defendants with respect to the first three counts of the indictment. You may find all three defendants guilty on all charges or you may find all three defendants not guilty on the first three counts, or you may find differently as to the individual defendants. You may find some of them guilty on some of these counts and not guilty on others, and let your verdict specify what your finding is.

There is one other matter which I should mention. I charge you that the presence of defendants at a still, if proved, with or without flight therefrom, or attempted flight therefrom, if proved, would be a circumstance for you to consider along with all the other testimony in the case. Of course, the bare presence at a distillery and flight therefrom of an innocent man is not in and of itself enough to make him guilty. It is possible under the law for an innocent man to be present at a distillery, and it is possible for him to run when about to be apprehended, [fol. 62] and such an innocent man ought never to be convicted, but presence at a distillery, if you think these men were present, is a circumstance to be considered along with all the other circumstances in the case in determining whether they were connected with the distil-

lery or not. Did they have any equipment with them that was necessary at the distillery? What was the hour of day that they were there? Did the officers see them do anything? Did they make any statements?

It is your duty to explore this case, analyze the evidence pro and con fairly. Presence at a still, together with other circumstances in the case, if they are sufficient in your opinion to exclude every reasonable conclusion except that they were there connected with the distillery, in an illegal manner, having possession and custody and control of it and carrying on the business as charged in these two counts, if you believe those things, would authorize you in finding the defendants guilty.

And under a statute enacted by Congress a few years back, when a person is off trial for possession of a non-registered distillery, as in this case, or for carrying on the business of a distiller without giving bond as required by law, as charged in this case, and the defendant is shown to have been at the site of the place at the time when the distilling apparatus is set up without having been registered, or where and at the time when the business of a distiller was engaged in or carried on without bond having been given, under the law such presence of the defendant shall be deemed sufficient evidence to authorize [fol. 63] conviction, unless the defendant by the evidence in the case and by proven facts and circumstances explains such presence to the satisfaction of the jury.

Now this does not mean that the presence of the defendant at the site and place at the time referred to requires the jury to convict the defendant, if the defendant by the evidence in the case, facts and circumstances proved, fails to explain his presence to the satisfaction of the jury. It simply means that a jury may, if it sees fit, convict upon such evidence, as it shall be deemed in law sufficient to authorize a conviction, but does not require such a result.

You may now retire with the indictment. Do you gentlemen wish this transcript of evidence in the other case to go to the jury room or not?

MR. JOE DAVIS: Yes sir.

THE COURT: Very well; let it go. And you may begin your deliberations. I may say that the Marshal will let you know in just a moment whether I have omitted

anything so as to require additional instructions, and if so he will bring you back. And if I have not omitted anything so as to indicate the necessity of additional instructions he will notify you and you will at that time, and not before, begin your deliberations.

(Jury retired.)

[fol. 64]

EXCEPTIONS TO CHARGE

THE COURT: Are there any exceptions, Gentlemen?

MR. JOE DAVIS: Yes sir, the defendants have some, if Your Honor please.

THE COURT: All right, sir.

MR. JOE DAVIS: If Your Honor please, we except to that portion of your charge as to aiding and abetting because that is the crux of the conspiracy case which was tried before, and there is no evidence whatsoever in this case to authorize a charge on aiding and abetting.

We except to that portion of your charge which refers to the fact that Cleveland Johns may have rented land from Amos Barlow, as we submit there is no evidence whatsoever in this case to authorize that charge.

We except to Your Honor's charge as to the difference between conspiracy and substantive cases, in that the evidence in this particular case does not authorize that charge on such a distinction, granted that such exists, of course, in certain circumstances. We take the position that the conspiracy case in Macon, insofar as the evidence is concerned, is similar to the evidence in this case and that there is no authorization for drawing that distinction between a substantive case and a conspiracy case.

We except to Your Honor's charge with respect to the [fol. 65] hauling of equipment to this still. They are not charged with having in their possession any material intending to use it in the violation of law, or with having in their possession any raw materials as the Internal Revenue statutes, of course, contemplate, and there is no basis for that charge as to equipment, and the fact that it has been injected into this case might, under the circumstances, create an unwarranted circumstance of guilt, we submit.

We except to Your Honor's charge that the presence of the defendant at the site of an illicit distillery is sufficient, unless he gets on the stand and explains why he is there; as being contrary to the constitutional provision that a man enters into the trial of a criminal case with the presumption of innocence in his favor, and it is upon the Government to prove his guilt beyond a reasonable doubt, and not upon the defendant to get upon the stand and explain why he was or was not doing a particular thing.

That's all

THE COURT: All right. We'll let—do you have any exceptions, Mr. Davis?

MR. BILL DAVIS: May it please the Court, the Government has no exceptions to the charge.

THE COURT: Very well, we will let the charge stand.

(Recessed 10:15 a.m., Jan 16, 1962.)

[fol. 66]

[Reporter's Certificate to foregoing transcript omitted in printing.]

IN UNITED STATES DISTRICT COURT

JUDGMENT OF ACQUITTAL AS TO COUNT 4—

January 16, 1962

The above stated case having been tried on January 15-16, 1962, and the jury having returned a verdict of not guilty, on Count 4.

IT IS HEREBY CONSIDERED, ORDERED AND ADJUDGED that the defendants above named are not guilty and that they be forthwith discharged and that the Clerk of this court enter this Judgment of Acquittal accordingly.

This the 16th day of January, 1962.

W. A. Bootle
U. S. Judge

IN UNITED STATES DISTRICT COURT

JUDGMENT AND COMMITMENT OF CLEVELAND JOHNS—
January 16, 1962
* * * *

On this 16th day of January, 1962 came the attorney for the government and the defendant appeared in person [fol. 67] and by counsel,

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty, and a verdict of guilty of the offense of 26 U.S.C.A. 5179(a), 5601(a), 5173, 5602, 5180, 5681(c), Counts 1, 2 & 3—Possessed an unregistered distillery; carried on the business of a distiller, without giving bond and with intent to defraud the United States of tax,

as charged

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

TWO AND ONE-HALF (2½) YEARS, or until he is otherwise discharged as provided by law; service of this sentence shall run concurrently with the sentence in Criminal No. 7824, Macon Division.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that copy serve as the commitment of the defendant.

At Americus, Georgia.

/s/ W. A. Bootle
United States District Judge

[fol. 68]

IN UNITED STATES DISTRICT COURT

JUDGMENT AND COMMITMENT OF JACKIE HAMILTON
GAINEY—January 16, 1962

On this 16th day of January, 1962 came the attorney
for the government and the defendant appeared in person
and

by counsel,

IT IS ADJUDGED that the defendant has been con-
victed upon his plea of not guilty, and a verdict of guilty
of the offense of 26 U.S.C.A. 5179(a), 5601(a), 5173,
5602, 5180, 5681(c), Counts 1, 2 & 3—Possessed an un-
registered distillery; carried on the business of a distiller,
without giving bond and with intent to defraud the United
States of tax,

as charged,

and the court having asked the defendant whether he
has anything to say why judgment should not be pro-
nounced and no sufficient cause to the contrary being
shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as
charged and convicted.

IT IS ADJUDGED that the defendant is hereby com-
mitted to the custody of the Attorney General or his au-
thorized representative for imprisonment for a period of

FIFTEEN (15) MONTHS, or until he is otherwise dis-
charged as provided by law.

IT IS ORDERED that the Clerk deliver a certified
copy of this judgment and commitment to the United
States Marshal or other qualified officer and that the
copy serve as the commitment of the defendant.

[fol. 69] At Americus, Georgia.

/s/ W.A. Bootle
United States District Judge

IN UNITED STATES DISTRICT COURT

JUDGMENT AND COMMITMENT OF ROY LEE BARRETT—
January 16, 1962
* * *

On this 16th day of January came the attorney for the government and the defendant appeared in person and by counsel.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty, and a verdict of guilty of the offense of 26 U.S.C.A. 5179(a), 5601(a), 5173, 5602, 5180, 5681(c), Counts 1, 2 & 3—Possessed an unregistered distillery; carried on the business of a distiller, without giving bond and with intent to defraud United States of tax,

as charged

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

ONE YEAR AND ONE DAY, or until he is otherwise discharged as provided by law.

[fol. 70] IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

At Americus, Georgia.

/s/ W.A. Bootle

United States District Judge

IN UNITED STATES DISTRICT COURT
NOTICE OF APPEAL—filed January 16, 1962

• • • • •
Notice is hereby given that Roy Lee Barrett, R.F.D., Hawkinsville, Georgia, Jackie Hamilton Gainey, Moniac, Georgia, and Cleveland Johns, R.F.D. Hawkinsville, Georgia, hereby appeal to the United States Court of Appeals for the Fifth Circuit from the judgment entered on January 16, 1962, committing named appellants to the custody of the Attorney General for the herein named periods of time on a four count indictment charging a violation of above cited statutes, to-wit:

Roy Lee Barrett—1 year and 1 day.
Jackie Hamilton Gainey—15 months.
Cleveland Johns—2½ years.

THIS 16th DAY of January, 1962.

ELLIOTT & DAVIS

/s/ By. Joseph H. Davis
Attorneys for the within
named appellants.

Address:

Suite 506 Persons Building
Macon, Georgia

[fol. 71]

IN UNITED STATES DISTRICT COURT

MOTION FOR ADMISSION OF DEFENDANTS TO BAIL PENDING
APPEAL—filed January 16, 1962

* * * *

The defendants, Roy Lee Barrett, Jackie Hamilton Gainey, and Cleveland Johns, move the Court to allow them to be at liberty on bail pending an appeal to the United States Court of Appeals for the Fifth Circuit, and in that connection show the Court the following facts:

The jury returned a verdict of guilty as to movants on the 16th day of January, 1962, and on the 16th day of January, 1962; judgment and sentence was entered as follows:

1. Roy Lee Barrett—1 year and 1 day.
Jackie Hamilton Gainey—15 months.
Cleveland Johns—Two and one-half years.
2. On January 16th, 1962, movants filed their notice of appeal from said judgment of conviction.
3. Movants verily believe that they have meritorious grounds for said appeal to the United States Court of Appeals for the Fifth Circuit and further represent that said appeal is not prosecuted by them for delay.

WHEREFORE, movant prays that this Court allow them bail pending the appeal of this case to the United States Court of Appeals for the Fifth Circuit.

ELLIOTT & DAVIS

/s/ By: Joseph H. Davis
Attorneys for defendants

Address:

Suite 506 Persons Building
Macon, Georgia

[fol. 72]

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING BAIL PENDING APPEAL—

January 16, 1962

* * * *

The within and foregoing motion having been read and considered, it is,

ORDERED AND ADJUDGED that upon movants giving bond in the following sums, to-wit:

Roy Lee Barrett.....	\$2,000.00
Jackie Hamilton Gainey.....	\$2,000.00
Cleveland Johns.....	\$2,000.00

with good and sufficient security to be approved by the Clerk of this Court, said judgments of conviction shall be superseded pending the final determination of the said appeal and that said named defendants shall remain at liberty pending the appeal of their case as aforesaid upon the furnishing of said bonds.

THIS 16th DAY of January, 1962.

/s/ W. A. Bootle
United States District Judge

ACKNOWLEDGEMENT OF SERVICE

[Omitted in printing]

ORDER FOR CLERK TO TRANSMIT EXHIBITS TO
USCA 5—March 1, 1962 [Omitted in printing]

[fol. 73]

DESIGNATION OF RECORD ON APPEAL

[Omitted in printing]

[fol. 74]

ORDER TO EXTEND TIME FOR PERFECTING AND
DOCKETING RECORD ON APPEAL—filed March
7, 1962 [Omitted in printing]

[Clerk's Certificate to foregoing
transcript omitted in printing.]

[fol. 75]

IN UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19574

ROY LEE BARRETT, JACKIE HAMILTON GAINES and
CLEVELAND JOHNS

versus

UNITED STATES OF AMERICA

MINUTE ENTRY OF ARGUMENT AND SUBMISSION.—October
15, 1962

On this day this cause was called, and submitted on the
record and briefs on behalf of appellants and after argu-
ment by William A. Davis, Jr., Esq., Assistant U. S. At-
torney, for appellee, was submitted to the Court.

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[fol. 76]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19574

ROY LEE BARRETT, JACKIE HAMILTON GAINES and
CLEVELAND JOHNS, APPELLANTS

versus

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the
Middle District of Georgia.

OPINION—September 5, 1963.

Before TUTTLE, Chief Judge, and WISDOM, Circuit
Judge, and JOHNSON, District Judge.

WISDOM, Circuit Judge: The defendants-appellants raise an important issue—the constitutionality of the statutory presumptions which Section 5601(b), Title 26 U.S.C.A. establishes. These are presumptions of a defendant's possession of a still and of carrying on the business of a distiller on a showing of the defendant's unexplained presence at the site of an unregistered still. [fol. 77] Reluctantly, because of a proper respect for Acts of Congress and because of the special competency of the legislature generally to establish rules of evidence and procedure,¹ we feel compelled to hold that these presump-

¹ A rule of presumption is simply a rule changing one of the burdens of proof, i.e. declaring that the main fact will be inferred or assumed from some other fact until evidence to the contrary is introduced. There is not the least doubt, on principle, that the Legislature has entire control over such rules as it has (when

tions violate the due process clause of the Fifth Amendment.

About a quarter to five on the morning of March 25, 1960, Roy Barrett, Jackie Gainey, and Cleveland Johns, the defendants, drove up in a truck to an unregistered still. Gainey got out and, seeing several officers, started to run. The officers outran him and arrested him. Barrett and Johns rolled up the windows of the cab, locked the doors, and tried to back the truck out of the yard. One of the officers broke a window with his flashlight and arrested the two men. The truck carried a full cylinder of butane gas similar to eight other cylinders found at the site of the still. The still, composed of two 2250-gallon tanks, was capable of producing between 450 and 500 gallons of whiskey. At the trial the officers testified that Barrett, shortly after his arrest, said that the still belonged to all three men. They had gone to the still "to make the first run."

[fol. 78] The defendants were convicted on three of four counts of violating the Internal Revenue Code provisions relating to illegal distilling. The first two counts charge the defendants with possessing an unregistered still and with carrying on the business of a distiller without having given the bond required by law. 26 U.S.C.A. 5601(a)(1) and (4). Count Three charges them with carrying on the business of a distiller with intent to defraud the United States of the taxes imposed upon liquor. 26 U.S.C.A. 5602. Count Four charges the defendants with "work[ing] in a distillery for the production of spiritous liquors upon which no sign was placed and kept, showing the name of the person engaged in the distilling and denoting the business." The trial judge directed a verdict of not guilty on this last count. The district court sentenced Barrett to one year and one day, Gainey to

not infringing the Judiciary's prerogative) over all other rules of procedure in general and evidence in particular—subject only to the limitations of the rules of Evidence expressly enshrined in the Constitution. If the Legislature can abolish the rules of disqualification of witnesses and grant the rule of discovery from an opponent, it can shift the burden of producing evidence. 4 Wigmore on Evidence §1356 (3d Ed. 1940).

fifteen months, and Johns to two and one-half years in the custody of the Attorney General.

I.

Section 5601 provides in part:

(a) Offenses.—Any person who—

(1) Unregistered stills.—*has in his possession or custody, or under his control, any still or distilling apparatus set up which is not registered, as required by section 5179(a); or*

* * *

(4) Failure or refusal of distiller or rectifier to give bond.—*carries on the business of a distiller or rectifier without having given bond as required by law;*

[fol. 79]

* * *

(b) Presumptions.—

(1) Unregistered Stills.—*Whenever on trial for violation of subsection (a) (1) the defendant is shown to have been at the site or place where, and at the time when, a still or distilling apparatus was set up without having been registered, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury (or the court when tried without jury).*

(2) Failure or refusal of distiller or rectifier to give bond.—*Whenever on trial for violation of subsection (a) (4) the defendant is shown to have been at the site or place where, and at the time when, the business of a distiller or rectifier was so engaged in or carried on, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury (or of the court when tried without jury).*

These presumptions were added to the Internal Revenue Code by the Excise Technical Changes Act of 1958, 72 Stat. 1398. According to the report of the Senate Finance Committee recommending the changes, the purpose of [fol. 80] these provisions was to overcome the effect of *Bozza v. United States*, 1947, 330 U.S. 160 S.Ct. 645, 91 L.Ed. 818:

"Their purpose is to create a rebuttable presumption of guilt in the case of a person who is found at illicit distilling or rectifying premises, but who, because of the practical impossibility of proving his actual participation in the illegal activities except by inference drawn from his presence when the illegal acts were committed, cannot be convicted under the ruling of the Supreme Court in *Bozza v. United States* (330 U.S. 160, 67 S.Ct. 645, 91 L.Ed. 818).

"The prevention of the illicit production or rectification of alcoholic spirits, and the consequent defrauding of the United States of tax, has long been rendered more difficult by the failure to obtain a conviction of a person discovered at the site of illicit distilling or rectifying premises, but who was not, at the time of such discovery, engaged in doing any specific act.

"In the *Bozza* case, the Supreme Court took the position that to sustain conviction, the testimony 'must point directly to conduct within the narrow margins which the statute defines.' These new provisions are designed to avoid the effect of that holding as to future violations." S. Rep. No. 2090, 85th Cong., 2d Sess. (1958); 3 U.S. Code Cong. & Adm. News 4395, 4580 (1958).

[fol. 81] The difficulty the Government has in proving illicit distilling is in connecting a defendant with the particular offense with which he is charged. This difficulty results in part from the statute: each step in the process of illicit distilling is narrowly defined as a separate offense. As the Supreme Court pointed out in *Bozza*:

"The Internal Revenue statutes have broken down the various steps and phases of a continuous illicit

distilling business and made each of them a separate offense. Thus, these statutes have clearly carved out the conduct of making mash as a separate offense, thereby distinguishing it from the other offenses involving other steps and phases of the distilling business. Consequently, testimony to prove this separate offense of making mash must point directly to conduct within the narrow margins which the statute alone defines. One who neither engages in the conduct specifically prohibited, nor aids and abets it, does not violate the section which prohibits it." *Bozza v. United States*, 1947, 330 U.S. 160, 67 S.Ct. 645, 91 L.Ed. 818.

There is little doubt of Congress' power in civil cases to establish a rule of law of presumptive evidence that is essentially a regulation of the burden of proof. See Mr. Justice Holmes' opinion in *Casey v. United States*, 1928, 276 U.S. 413, 418, 48 S.Ct. 373, 72 L.Ed. 632 and Mr. Justice Cardozo's opinion in *Morrison v. California*, 1934, 291 U.S. 82, 90, 54 S.Ct. 281, 78 L.Ed. 664. When, however, the legal effect of the rule is to allow an accused person to be found guilty of a crime solely on the basis [fol. 82] of the presumption, unless he comes forward with evidence to overcome the nonexistence of the presumed fact, the practical effect is to coerce the accused into taking the stand in spite of the Fifth Amendment provision that "No person . . . shall be compelled in any criminal case to be a witness against himself." The presumption gives short shrift to the constitutional privilege. It is all very well to say that the defendant need not take the stand: all he has to do is to come forward with evidence.² But should the accused exercise his constitutional privilege of remaining silent, the presumption amounts to decisive, unanswerable comment on his Fifth Amendment right not to testify. Even if an accused should take the stand, the effect of the presumption does not disappear, since the law provides that the presumption is still "sufficient evidence to authorize conviction." A person accused of a crime has more than the right to present evidence in his defense. He has the constitutional right to

² See 4 Wigmore on Evidence § 1356, p. 732 (3d Ed. 1940).

sit on his hands. As Justice Peaslee of the New Hampshire Supreme Court ably said:

It is said that so long as the defendant has preserved to him the right to fully present his defense, and then have the evidence weighed, he has nothing to complain of. But the right to make defense is not the whole right secured to one charged with crime. He has also the right to insist that before he can be found guilty there must be substantial evidence upon every fact essential to the establishment of his guilt; and that this evidence shall be weighed by the jury and found sufficient to prove [fol. 83] the case. It is his right to produce any evidence and to stand solely upon the proposition that the state must prove a case against him.

* * * *

The rule of the Constitution is that the defendant in a criminal case cannot be compelled to go forward.

* * * *

In a criminal prosecution, nonaction of the defendant cannot be substituted for action upon the part of the state, as to any matter required to be established as a part of the state's case. Neither the burden of proof nor the burden of proceeding with any evidence to prove such case can be imposed upon the party charged with crime. *State v. Lapointe*, 1924, 81 N.H. 227, 123 Atl. 692, 696.

"[I]t is not within the province of a legislature," Justice Holmes has said, "to declare an individual guilty or presumptively guilty of a crime." *McFarland v. American Sugar Refining Co.*, 1916, 241 U.S. 79, 36 S.Ct. 498, 60 L.Ed. 890. The unquestioned policy of the criminal law has placed upon the prosecution the burden of proving beyond a reasonable doubt all facts necessary to the defendant's guilt. The Government starts with both the burden of proof and the burden of persuasion.³ A statute

³ Here we are not concerned with exceptions based on affirmative defenses such as insanity and self-defense. These defenses do not negative the factual elements of guilt which the prosecution must prove. See Note, Rebuttable Presumptions 55 Col.L.Rev. 527, 543 (1953).

which shifts either one or both of these burdens to an accused is difficult to reconcile with our hard-earned heritage of fair trials. If the shift compels an accused to come forward with an exculpatory explanation—or else, before the prosecution has made a substantial showing of probability of guilt, the presumption collides with the most fundamental canon of criminal law—the presumed innocence of the defendant. These considerations compel the courts to scrutinize closely any statutory rebuttable presumption of an ultimate fact essential to the proof of a crime.⁴

This brings us to the magic words, “rational connection,” the touchstone by which the Supreme Court tests the validity of a statutory presumption. It is not an easy test to apply: in the nature of things any test would lack concreteness. Such a test is perhaps open to the criticism that rationality of legislation is off-limits to the judiciary. Still, it is the test we must apply. We read it as a test [fol. 85] of *reasonableness* more than of bare *rationality*: to comply with the due process clause, proof of the fact upon which the statutory presumption is based must carry a reasonable inference of the ultimate fact presumed.

The Supreme Court first established this test in *Mobile*,

⁴ There is a large volume of legal writings on rebuttable statutory presumptions. See, for example, Thayer, Preliminary Treatise on the Law of Evidence at the Common Law 813-52 (1898); 4 Wigmore, Evidence § 1356, 2490-93, (3d Ed. 1940); McCormick, Evidence 639-40 (1954); Bohlen, The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof, 68 U. of Pa. L.Rev. 307 (1920); Brosman, Statutory Presumptions, 5 Tul.L.Rev. 17, 178 (1930-1931); Keeton, Statutory Presumptions, 10 Tex.L.Rev. 34 (1932); Morgan, Some Observations Concerning Presumptions, 44 Harv.L.Rev. 926 (1931); Morgan, Instructing the Jury Upon Presumptions and Burdens of Proof, 47 Harv.L.Rev. 59 (1933); Hale, Necessity of Logical Inference to Support a Presumption, 17 S.Cal.L.Rev. 48 (1943); Morgan, Tot v. United States: Constitutional Restrictions on Statutory Presumptions, 56 Harv.L.Rev. 1324 (1943); Ray, Presumptions and the Uniform Rules of Evidence, 33 Tex.L.Rev. 588 (1955); Note, Constitutionality of Rebuttable Statutory Presumptions, 55 Col.L.Rev. 527 (1955); Morgan, How to Approach Burdens of Proof and Presumptions, 3 Rocky Mt. L.Rev. 34 (1953); Morgan, 1 Basic Problems of Evidence 30, 33-55 (A.L.I. 1954); Laughlin, In Defense of the Thayer Theory of Presumptions, 52 Mich.L.Rev. 195 (1953).

J. & K.C. R.R. v. Turnipseed, 1910, 210 U.S. 35, 43 S.Ct., 136, 55 L.Ed. 78. *Turnipseed* was a civil action, but the test is applied in both civil and criminal cases. See also *Yee Hem v. United States*, 1925, 268 U.S. 178, 45 S.Ct. 470, 69 L.Ed. 904; *McFarland v. United States*, 1925, 241 U.S. 79, 36 S.Ct. 498, 60 L.Ed. 890; *Minski v. United States*, 6 Cir., 1942, 131 F.2d 614, affirmed 319 U.S. 463, 63 S.Ct. 1241, 87 L.Ed. 1519; *Caudillo v. United States*, 9 Cir. 1958, 253 F.2d 513, cert. den. 357 U.S. 931; *Manning v. United States*, 5 Cir. 1960, 247 F.2d 926; Annotations 51 A.L.R. 1139, 86 A.L.R. 179, 162 A.L.R. 477, 495. In *Tot v. United States*, 1943, 319 U.S. 463, 63 S.Ct. 1241, 1243, 87 L.Ed. 1519, the Supreme Court explained what it meant by "rational connection." The Court had before it the Federal Firearms Act, 15 U.S.C.A. § 902(f). Section 2(f) of this Act made it unlawful for a person who is a fugitive from justice or who has been convicted of a crime of violence to receive a firearm shipped or transported in interstate commerce. The Act provided that "the possession of a firearm or ammunition by any person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received, as the case may be, by such person in violation of this Act." [fol. 86] In holding that Section 2(f) violated the Due Process clause, the Court said:

"The Government seems to argue that there are two alternative tests of validity of a presumption created by statute. The first is that there be a rational connection between the facts proved and the fact presumed; the second that of comparative convenience of producing evidence of the ultimate fact. We are of the opinion that these are not independent tests but that the first is controlling and the second but a corollary. Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience. This is not to say that a valid presumption may not be created upon a view of relation broader than that a

jury might take in a specific case. But where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them it is not competent for the legislature to create it as a rule governing the procedure of courts." (Emphasis added.)

Thus, under *Tot*, it is not enough that the fact proved be relevant to the ultimate fact presumed. The fact proved must carry an inference of the fact presumed. Moreover, the inference must not be "strained:" it must be so reasonably related to the fact proved as to tend to establish [fol. 87] the defendant's guilt. For example, 18 U.S.C.A. § 659 makes it a criminal offense to have in one's possession goods knowing them to have been stolen from a carrier in interstate commerce. Under that statute evidence of a defendant's possession of recently stolen goods casts upon the defendant the burden of explaining the possession. There is a "rational connection" between an accused's possession of recently stolen property and the theft of the property. *Yielding v. United States*, 5 Cir. 1949, 173 F.2d 46. And see *Wilson v. United States*, 1896, 162 U.S. 613, 16 S.Ct. 895, 40 L.Ed. 1090. "[I]n such a case it remains true that the prosecution still has the burden of proving the accused guilty by evidence of facts and inferences fairly drawn from the fact proved." *Government of the Virgin Islands v. Torres*, D.C. Virgin Is. 1958, 161 F.Supp. 669. But suppose that all the statute requires the Government to prove is that the accused was in "possession" of an article "which may reasonably be suspected of being stolen." 14 V.I.C. § 2102(b) so provided. In *Torres*, Judge Maris held that the statute was invalid under the Due Process clause: "There is not such a rational connection between the facts proved by the prosecution and the fact which the statute permits to be inferred from those facts."

How do subsections 5601(b) (1) and (2) fare under the "rational connection" criterion? First of all we note that the declared reason for the presumption, according to the Senate Finance Committee Report, is inconvenience of proof. Mere convenience to the Government in proving its case is not a sufficient basis for presumption. This is

[fol. 88] *Tot's* teaching. It is true that an accused knows why he possesses a firearm or is at a still-site, or has better means of information than the Government. In answer to this argument, the Court said in *Tot*:

The Government seems to argue that there are two alternative tests of the validity of a presumption created by statute. The first is that there be a rational connection between the facts proved and the fact presumed; the second that of comparative convenience of producing evidence of the ultimate fact. We are of opinion that these are not independent tests but that the first is controlling and the second but a corollary. Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience. This is not to say that a valid presumption may not be created upon a view of relation broader than that a jury might take in a specific case. But where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them it is not competent for the legislature to create it as a rule governing the procedure of courts. 319 U.S. at 469.

Section 5601(b)(1) makes mere presence of a defendant at an unregistered distillery presumptive evidence [fol. 89] that the still is "in his possession or custody, or under his control." A defendant's presence at a still is certainly a relevant fact, but it is not realistic or reasonable to say that such presence carries the inference of *possession* of the still. Possession of a thing such as a still involves the highly technical legal concept of dominion, control. As we pointed out in *McFarland v. United States*, 5 Cir. 1960, 273 F.2d 417, 419, "Possession of a still is not the same as possession of a hat or a ring or a nickel." In that case we approved the definition the district court gave to the jury:

"Possession of an unlawful still means that the defendant must have some dominion over the property, or some extrinsic circumstance that gives him the right to possess which includes control. It means having, holding or detention of property in one's own power or command. Ownership, whether rightful or wrongful, is not necessary to establish possession. ¶ Possession may be defined as having personal charge of, or exercising the rights of management or control over the property in question. Mere presence at the scene of an unlawful distillery with nothing more doesn't constitute possession." 273 F.2d at 419.

This Court has held, time and again, that "mere presence at a still site cannot support a conviction for violation of the liquor laws relative to the still." *Fowler v. United States*, 5 Cir. 1956, 234 F.2d 697. Accord, *Vick v. United States*, 5 Cir. 1954, 216 F.2d 228; *Cantrell v. United States*, 5 Cir. 1946, 158 F.2d 517. See *McFarland [fol. 90] v. United States*, 5 Cir. 1960, 273 F.2d 417. The Fourth Circuit, in a case decided after the adoption of the 1958 Amendments to Section 5601, *United States v. Freeman*, 4 Cir. 1961, 286 F.2d 262, held that

"We have found no cases, and none have been cited, where mere presence in the general locality of the still, without some corroborating facts or circumstances to connect the accused with the particular still or the liquor business in general, has been held sufficient to convict one of carrying on the business of a distiller."

This absence of a natural inference of possession of a still from presence at a still distinguishes the presumption here at issue from the statutory presumption this Court upheld in *Manning v. United States*, 5 Cir. 1960, 274 F.2d 926. There we were dealing with Section 4744 (a) (1) of the Internal Revenue Code, which stipulates that "proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the Secretary or his delegate, to produce the order form required by Section 4742 to

be retained by him shall be presumptive evidence of guilt under this subsection. . . ." In such cases, unlike the case at bar, possession is proved. The statute simply creates a presumption that certain possessions are unlawful. On the other hand, in the instant case only presence near an unregistered still need be proved; the crime itself—possession—is presumed.

Violation of the narcotics laws from possession of marihuana is a natural and compelling inference, for [fol. 91] there is almost no other explanation than guilt consistent with the possession of marihuana. The Ninth Circuit, passing on an almost identical statute in *Caudillo v. United States*, 9 Cir. 1958, 253 F.2d 513, cert. den., 357 U.S. 931, 78 S.Ct. 1375, 2 L.Ed. 2d 1373, pointed this out clearly. "The difficulty with appellants' reliance on the Tot case is that it provides no precedent in this, a factually different case. The possession of a firearm or ammunition is ordinarily lawful. There exists the possibility of lawful possession of opium derivatives, or other narcotics, for they have definite therapeutic medical values and a scientific need exists for their possession by many doctors and almost every hospital in the United States. But this Court knows of no medical or scientific use to be made of marihuana, save perhaps for occasional testing, in order to make scientific comparisons with other narcotics, barbiturates, and amphetamines."

Marihuana is not a plant the ordinary citizen cultivates in his garden; almost no inference other than a violation of the narcotics laws can be drawn from possession of marihuana. But there are many inferences other than possession which can be drawn from presence at a still. A defendant might be a hunter who stumbled upon the still, as in *Vick v. United States*, 5 Cir. 1954, 216 F.2d 228. He might even be a prospective purchaser of the liquor. He might be present for any one of dozens of other equally probable reasons having nothing to do with possession. Courts should defer to legislative judgment when the legislature, drawing on its broad knowledge of society and [fol. 92] human relationships, decrees, for example, that possession of marihuana, when proved, plus failure to produce an order form, "after reasonable notice and de-

mand," form a proper basis for a rational inference of presumptive guilt. "But when the question is whether reasonable men may differ as to whether a given inference may reasonably be drawn from given data, the answer of a tribunal of last resort may rationally be accepted." Morgan, Note 56 Har.L.Rev. 1324 (1943). And the courts hold, as a matter of law, that reasonable men can not infer possession from the given datum of an accused's presence at a still-site.

Since the presumption established by subsection 5601 (b) (1) falls under the ban of unconstitutionality, subsection (b) (2) must, *a fortiori*, fall; for it makes presence at a still presumptive evidence of carrying on the business of a distiller. Certainly, there is far less ground for the probability of this inference—which, in fact, is a double one, from presence to possession to carrying on a business without bond—than there is for the first one. Neither statutory presumption is grounded upon "the normal balance of probability," *Tot v. United States*, 1943, 319 U.S. 463, 63 S.Ct. 1241, 87 L.Ed 1519.

We hold, therefore, that the trial judge's incorporation of the presumptions into the instruction to the jury operated to deprive the defendants of their constitutional right to due process of law.

[fol. 93]

II.

None of the presumptions established by Section 5601 (b) relate to Section 5602, which was the basis of the third count on which the defendants were convicted. In charging the jury, however, the trial judge referred to Counts two and three in almost identical language and made little or no distinction between them. He stated, "Counts two and three charge that these three defendants carried on the business of distillers of spiritous liquors, Count two saying without having given bond as required by law, and Count three saying with intent to defraud the United States of the tax imposed thereon." In the only other reference to Count three he said, "under the law a substantive offense as distinguished from a conspiracy is a violation of any statute other than the conspiracy statute, for instance, possession of distilling ap-

paratus as charged in Count one and carrying on the business of distillers as charged in Counts two and three." We hold that the trial judge erred in not specifically instructing the jury that the presumptions related solely to Counts one and two. In view of the close connection between Counts two and three, which were uniformly treated together by the trial judge, it is unlikely that the jury could have made a distinction between the presumptions and the specific counts to which they related.

III.

The record shows no evidence whatever of intent to defraud. The conviction under Count three cannot therefore be supported.

[fol. 94]

IV.

The only question remaining is whether the case should be remanded for a new trial because, aside from the presumptions, there is sufficient evidence to sustain a jury verdict of guilty.

The appellants point out that defendants were never actually working at the still, but were merely in or near the site when arrested. They rely on such cases as *Vick v. United States*, 5 Cir. 1954, 216 F.2d 228 and *Fowler v. United States*, 5 Cir. 1956, 234 F.2d 697, which we have referred to earlier in this opinion.

We find far more than mere unexplained presence at a still. Defendants drove up to an illicit distillery hidden in a swamp at 4:40 in the morning. They were carrying no rifles, fishing gear, or any other equipment which a hunter or fishermen would have with him. Rather, they were hauling in a Dodge pick-up, not the two cans of gasoline which were in evidence in *Fowler*, but a full tank of butane gas, identical with eight others at the still-site. When they saw the officers, they tried to escape. Moreover, two of the arresting officers testified that Barrett had admitted ownership of the still, and the owner of the property on which the still was located testified that Cleveland Johns had offered to pay him \$15.00 a week if he could use the land by the Swamp to

“do a little business.” As we said in *McFarland v. United States*, 5 Cir. 1960, 273 F.2d 417, 419:

“There is no doubt that mere presence at a still is not enough in itself to constitute possession of the [fol. 95] still. There is no doubt that flight is not enough in itself to create a presumption of guilt. But presence at a still in the dead of night, flight, knowledge of the location of a well-concealed still, knowledge of the operations (when the mash would be ready for distillation), control over the still (no others were present except in a subordinate capacity), control (Purchase?) of the output, admissions of previous visits to the still, and other evidence pointing to McFarland's relation to the still were enough for the jury to infer that he had control and custody to the extent sufficient to add up to possession.” —

We hold, therefore, that the record shows sufficient evidence on the first two counts to support a jury finding that the defendants were in possession of the unregistered distillery.

Jurors are practical persons. It is entirely possible that here the jurors assessed the presumptions for what they are worth or entirely ignored them. Because, however, it is impossible to know the extent, if any, to which the jury relied upon the presumptions in returning its verdict, and whether it believed all, part, or none of the evidence other than that establishing the defendants' presence at the still, we have concluded that in the interests of justice the case should be REVERSED and REMANDED for a new trial on Counts One and Two.

[fol. 96]

IN UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1962

No. 19,574

D. C. Docket No. 1411 Crim—Americus Div.

ROY LEE BARRETT, JACKIE HAMILTON GAINES and
CLEVELAND JOHNS, APPELLANTS

versus

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the
Middle District of Georgia.

Before Tuttle, Chief Judge, and Wisdom, Circuit Judge,
and Johnson, District Judge.

JUDGMENT—September 5, 1963

This cause came on to be heard on the transcript of
the record from the United States District Court for the
Middle District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here or-
dered and adjudged by this Court that the judgment of
the said District Court in this cause be, and the same is
hereby, reversed; and that this cause be, and it is hereby,
remanded to the said District Court for a new trial on
Counts One and Two.

Issued as Mandate: October 11, 1963

[fol. 97]

[Clerk's Certificate to foregoing
transcript omitted in printing.]

[fol. 98]

SUPREME COURT OF THE UNITED STATES

No. —, October Term, 1963

UNITED STATES, PETITIONER

vs.

ROY LEE BARRETT, JACKIE HAMILTON GAINES and
CLEVELAND JOHNS

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF
CERTIORARI—October 4, 1963

UPON CONSIDERATION of the application of counsel for
petitioner,

IT IS ORDERED that the time for filing petition for writ
of certiorari in the above-entitled cause be, and the same
is hereby, extended to and including Nov. 4th, 1963

/s/ Hugo L. Black

Associate Justice of the
Supreme Court of the
United States.

Dated this 4th day of October, 1963